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February 19, 2002

Board of Adjustment
The Town of Fenwick Island
800 Coastal Highway
Fenwick Island, DE 19944

ATTN: Mary Pat Kyle

RE: Board of Adjustment Standard For Review

Dear Mary Pat:

As we discussed, you may wish to share with the other members of the Board of Adjustment the following discussion about the standard to be applied for area variances. Most requests for variances are for "area" variances. A "use" variance requires a standard of "unnecessary hardship" and is applied when a variance will change the character of zoned district "by allowing the land to be used for a purpose otherwise proscribed by the zoning regulations." Basic Communications Group, LLC v. Kent County Board of Adjustment, Super. Ct., 2000 WL 33110109. Witham, J., at * 4, (October 31, 2000).

More typically, boards of adjustment must determine whether to grant an area variance. This "does not involve a prohibited use, 'and concerns only the practical difficulty in using the particular property for permitted use.'" Id. at 4 citing Board of Adjustment v. Kwik-Check Realty, Inc., Del. Supr. 389 A.2d at 1291. "Examples of area variances include modifications of setback lines and yard requirements." Kostyshyn v. City of Wilmington Zoning Board of Adjustment, Del. Super. 1990 WL 58226 at *1, Del Pesco, J. (April 12, 1990).

An area variance requires the less burdensome standard of "exceptional practical difficulties." See Kwik-Check at 1291.

The Courts in Delaware have concluded that Boards of Adjustment must particularize their findings of fact and conclusions of law in order that a reviewing Court will know what the Board looked at and considered in making a decision. If a decision of the Board of Adjustment is appealed to the Superior Court, the Superior Court will review whether the record contains substantial

evidence addressing each of the factors to be considered and whether the Board's conclusions were supported by such substantial evidence.

The Board must consider each factor and must discuss each factor on the record and determine the weight and impact of each factor when making a decision.

The standard has four factors and must determine "whether a literal interpretation of the zoning regulations results in exceptional practical difficulties of ownership." See Kwik-Check Realty Company, Inc. v. Board of Adjustment of New Castle County, Del. Super., 369 A.2d 694, at 698 (1977).

The factors are as follows:

1. "The nature of the zone where the property lies." What are the land's characteristics, what zone is it in, what has been the use of the land, what is the proposed use or change or modification.
2. "The character and uses of the immediate vicinity." There should be testimony about the property surrounding the site.
3. "Whether the removal of the restriction on the applicant's property would seriously affect the neighboring property." This includes hearing and reviewing evidence sufficient of the "serious affect" which granting the variance would have on the neighboring properties. The Board may hear about potential concerns raised by neighboring properties. While various concerns or questions may be raised, specific health, safety or welfare concerns must be articulated or tied specifically to the variance requests. The Board will then be able to determine whether there is sufficient evidence to counteract such concerns.
4. "Whether failure to remove the restrictions would create...an exceptional practical difficulty for the owner in relation to his efforts to make normal improvements in the character or use of the property." See Basic Communications Group, LLC. The Courts have said the "essentially this requires the Board to evaluate the requested variance by considering the harm to the applicant if the variance is denied [balanced] against the probable effect on neighboring property if the variance is granted." The Board's evaluation must be based on sufficient evidence on any such effects. See Basic Communications Group, LLC.

Furthermore, there are other factors that may and should be considered and weighed by the Board of Adjustment:

1. Whether the variance application is before or after the difficulty is encountered.
2. Whether there is an economic factor. "Economic hardship alone... is not enough in itself to justify a variance, particularly if the owner had bought the property with full knowledge of the zoning restrictions." See Homan v. Lynch, Del. Supr., 147 A.2d 650 at 654 (1959). Furthermore in Kwik-Check, the Court further stated that "the inability to improve one's business or to stay competitive as a result of area limitations, may be a legitimate exception practical difficulty that would justify a grant of a variance." The Kwik-Check Court went on to set forth the following standard: "such practical difficulty is present where the requested dimensional change is minimal and the harm to the applicant if the variance is denied will be greater than the probable effect on neighboring properties if the variance is granted." The Courts will look to see if the substantial evidence on this aspect is in the record.
3. If a hardship or difficulty has been self-created, a variance is generally denied. Generally, "self-imposed or self-created hardships are those that 'arise from difficulties uniquely personal to the owner, rather than intrinsically related to the property itself.'" Dexter v. New Castle County Board of Adjustment, Del. Super., C.A. No. 96A-03-003-CHT, 1996 WL 658861 at *3, Toliver, J. (September 17, 1996) (Order). The Courts have also found that a self-created hardship exists where there has been "some kind of affirmative action on the part of the landowner." See Dexter. Simply having prior knowledge of the existing zoning regulations "does not preclude the right to a variance; it is merely an element to be considered in determining the existence of hardship." See Hanley v. City of Wilmington Zoning Board of Adjustment, Del. Super., C. A. No. 99A-12-004-WTQ, 2000 WL 1211173 at *3, Quillen, J. (August 3, 2000) (Letter Op.) Quillen, in the Hanley case, particularly noted that the general law states that "it should not be within the discretion of a board of appeals to deny a variance solely because a purchaser bought with knowledge of the zoning restrictions." See Hanley.

Furthermore the Board must address and decide that:

1. The variance will not be contrary to the public interest.
2. There is the existence of special conditions.
3. The spirit of the zoning ordinance is observed by the grant/denial of the variance.
4. Substantial justice is done.

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5. The variance is the minimum necessary to resolve the exceptional practical difficulty found to exist.

I am also including a short summary of the above discussion of the state of the case law in Delaware at this time for easier reference.

I am happy to discuss this with you further at your convenience.

Very truly yours,

TUNNELL & RAYSOR, P.A.

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